Supreme Court, U.S.
FILED
AUG 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1968

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, a limited partnership
Petitioner,

VS.

NATIONAL FOOTBALL LEAGUE, et al.
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
505 Sansome Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 788-2700

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
650 California Street, 23rd Floor
San Francisco, CA 94108
Attorneys for Petitioner
Los Angeles Raiders

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
First Question Presented: Res Judicata of an Affirmed Rule 54(b) Judgment	1
Second, Third and Fifth Questions	3
Fourth Question; Offset Before Trebling	4
Conclusion	5

TABLE OF AUTHORITIES

Cases Cited

Page

Burlington Industries v. Milliken & Co., 690 F.2d 380 (4 Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) 4

Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 3, 4

Los Angeles Memorial Coliseum Com'n v. Nat. Football League, 634 F.2d 1197 (9 Cir. 1980) 3

Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9 Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 4

Telex Corp. v. IBM, 367 F.Supp. 258 (N.D. Okla. 1973) 4

Statutes and Rules

Federal Rules of Civil Procedure:

Rule 42(b) 2

Rule 54(b) 3

No. 86-1968

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, a limited partnership
Petitioner,

VS.

NATIONAL FOOTBALL LEAGUE, et al.
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The brief of respondents (hereafter "NFL") in opposition confirms that the petition should be granted.

I. FIRST QUESTION PRESENTED: RES JUDICATA OF AN AFFIRMED RULE 54(b) JUDGMENT

The basic fallacy of the opposition appears at the outset. It denominates Raiders' moving to Los Angeles as a "unilateral seizure of [a] valuable business opportunity" that "belonged to the League as a whole" (p. 2). But Raiders "seized" nothing, unilaterally or otherwise. Raiders moved to Los Angeles only when a *final* judgment of a district court adjudicated that it was a violation of the Sherman Act for NFL to keep Raiders out of Los Angeles and enjoined NFL from preventing Raiders from doing so. NFL concedes that, at the trial which culminated in that final judgment, it urged as a defense to liability that the opportunity to place an NFL team in Los Angeles belonged to the league (p. 8). When the defense failed and the judgment was appealed, it was not modified to provide that the injunction was conditioned on

Raiders paying a price. The judgment was unconditional and was affirmed. NFL argues that on the later appeal from the damages judgment the court below did not tamper with that injunction (p. 3). On the *contrary*, the court openly based its decision on the *premise* that the final injunction was "overbroad", and "*exceeded* the scope of the liability verdict" (Petition, p. 8).

NFL's fallacy comes to a sharp focus when it states (p. 4):

> "The Raiders' argument also depends on a mistaken view of *res judicata*. That doctrine only prohibits relitigating issues once there has been a final judgment on the merits of an action. *Res judicata* is intended to prevent two *separate actions* but does not prevent timely appeals on all issues decided when a trial is bifurcated. *See* Restatement (Second) of Judgments § 13 (1982)." [Italics in original.]

There was here more than bifurcation under F.R.Civ.P. Rule 42(b); there was finality of the judgment under Rule 54(b).

NFL continues:

> "This is not a case in which the NFL has attacked the injunction in a separate action, or has denied its effect. Rather, a panel of the Ninth Circuit—the same panel that heard the initial appeal—has reviewed and vacated a subsequent judgment for money damages in favor of the Raiders while leaving intact the injunctive relief that entitles the team to play in Los Angeles."

This concedes that if the prior judgment had been entered in a separate action, it would constitute a *res judicata*. The contention reduces itself to this, that simply because the prior judgment was in the same action it was not final.

Thereby, NFL necessarily concedes that the case presents the very first question stated in the petition, *viz.*: Is a *final* judgment any less *res judicata* where the issue decided was carved out under Rule 42(b) and the judgment became final under Rule 54(b) than if rendered in a separate action? The decision below on its very face has ignored the *res judicata*, and certiorari should issue to prevent the mischief from spreading through the law.

NFLs' fallacy is disclosed in all nakedness in its statement at page 11:

> "The seizure of the League opportunity resulted when the Raiders moved to Los Angeles. The interim loss of profits on which the jury's award was based was intended to compensate for the *delay* in the move to Los Angeles." [Italics added.]

But suppose there had been no delay. In early 1980 a preliminary injunction issued in the district court enjoining NFL from preventing Raiders from moving to Los Angeles, but it was stayed and, in December, 1980, reversed by the Court of Appeals, *Los Angeles Memorial Coliseum Com'n. v. Nat. Football League*, 634 F.2d 1197 (9 Cir. 1980). Had it not been stayed and reversed, Raiders would have been in Los Angeles in 1980, and there would have been no delay. Respondents' reasoning would lead to the conclusion that, when the final decree in 1982 immunized Raiders' presence in Los Angeles from NFL veto, Raiders would have had to pay NFL full value for the "Los Angeles opportunity", with an offset against nothing. But to effect that result, the final injunction would have had to be *reconstructed* to provide that the right to move to Los Angeles was conditioned on payment of a price to NFL.

II. SECOND, THIRD AND FIFTH QUESTIONS:

NFL nowhere tells the Court what body of law granted to NFL "ownership" of the "opportunity" to play in Los Angeles" and thereby overrode the prior adjudication that the Sherman Act forbids denial of that opportunity to Raiders. NFL does not tell one from what bottle this genie emerges. As it does not come from California law, NFL must be contending that it comes from antitrust law. Even apart from *res judicata*, such a remarkable proposition of new antitrust law, rejected as a defense to liability, will spread widely as a defense to damages if not checked. What Justice White (in the Court's opinion in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968)) said of the passing-on defense is applicable here:

> "[I]t is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."

III. FOURTH QUESTION: OFFSET BEFORE TREBLING

In support of offsetting before trebling, NFL draws a long bow by citing *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9 Cir. 1971), *Burlington Industries v. Milliken & Co.*, 690 F.2d 380 (4 Cir. 1982), and the district court decision in *Telex Corp v. IBM*, 367 F.Supp. 258 (N.D.Okla. 1973). These are not offset cases at all but determinations of the antitrust damages. In *Siegel* plaintiff's damage from an unlawful tie was not the total unsegregated consideration paid as the purchase price of goods illegally required to be purchased plus the fee for a license for trademarks and know-how, but that portion of the consideration attributable to the purchase price, as royalty for the trademark license and know-how was legitimate. In *Burlington* the illegality was conspiratorial fixing of royalties for use of certain patented machines, and it was held that the damages were the total royalties paid less what would have been paid as royalty for use and purchase of the machines had there been no antitrust violation. In *Telex*, the measure of plaintiff's damages for IBM's supposed violation of the antitrust laws* was a determination of the lawful competitive position Telex would have occupied in the industry but for the antitrust violation, and that competitive position did not include advantages that the plaintiff had by virtue of unlawful appropriation of defendant's trade-secrets and copyrights. Such was the reasoning.

Damages from the violation in the present case consist of all the "delay" damages, to use NFL's terminology. If there was such a thing as NFL ownership of the "opportunity to play in Los Angeles", the value of that opportunity was the same whether there had been any delay or not. It would have been the same if the preliminary injunction had stayed in effect and allowed the

---

* On appeal it was held that IBM had not violated the antitrust laws.

Raiders to move in 1980 so that no delay would have occurred. (See p. 3 above.) In short, the damages for delay and the value of the opportunity to play in Los Angeles are not connected. Antitrust law trebles the antitrust damages to forward a public policy; no law and no policy treble the value of the "opportunity to play in Los Angeles". Judge Nelson was entirely correct in her dissent on this issue, and the majority decision calls for this Court's correction to avoid confusion and undermining Congress' purpose in directing trebling.

CONCLUSION

A variety of incorrect statements appears in NFL's brief in opposition, such as that the Court of Appeals' offset theory is one that NFL urged in the district court and on the appeal, rather than, as Judge Nelson denominates it, an idea of the Court of Appeals raised by it "*sua sponte*". Similarly, NFL makes statements concerning testimony given in the trial court. At this juncture, where the issue is whether there are important questions to review, we refrain from pursuing these items further.

We respectfully submit that the petition should be granted.

DATED: San Francisco, California, August 28, 1987

* MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
Professional Corporation

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
Attorneys for Petitioner
Los Angeles Raiders

* Counsel of record